UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD J. FOX, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER DE-0752-98-0211-I-1 DATE: APR 26 1999

Rosemary C. Boschert, Esquire, and Toby Alback, Boschert Law Firm, Billings, Montana, for the appellant.

Wayne A. Momsen, Whitehall, Montana, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of an initial decision that affirmed the agency's demotion action. For the following reasons, we GRANT the petition for review, AFFIRM the administrative judge's finding that the agency proved its charge, VACATE the rest of the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency reduced the appellant in grade and pay from a PS-9 Electronics Technician (ET) ($41,338.00) at the Billings, Montana Post Office to a PS-3 Custodian ($35,344.00) at the same location based on a charge that he was unable

to attend required training at the Norman, Oklahoma Technical Training Center due to his medical condition (hypertension), which prevented him from sitting for prolonged periods of time in a car, plane, or classroom. Appeal File (AF), Tab 8, Subtabs 4P and 4U. The duties and responsibilities of a PS-9 ET include participating in classroom, on-the-job, and correspondence training programs, and attending courses at postal facilities, trade schools, and manufacturers' sites. AF, Tab 9, Subtab 4PPP.

¶3 On appeal, the appellant alleged that the agency discriminated against him based on a disability, and that the penalty was not reasonable. AF, Tab 23. After a hearing, the administrative judge found that the charge was sustained, the appellant did not prove discrimination, and the penalty was reasonable.

ANALYSIS

New Evidence

¶4 The appellant submits for the first time with his petition for review a copy of a September 1, 1987 Memorandum of Understanding between the American Postal Workers Union, AFL-CIO, and the U.S. Postal Service that sets forth the procedures to be used when an employee is temporarily unable to work all of the duties of his normal assignment. The appellant claims that he did not submit this document below because his attorney believed that "the point had been well made through other evidence and testimony." Petition for Review (PFR) at 8.

¶5 The Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Here, the appellant has made no such showing. Moreover, the appellant is responsible for the errors of his chosen representative. *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Thus, we have not considered this evidence on review.

The Charge

¶6 The appellant does not contest on review the administrative judge's finding that the agency proved its charge, and we discern no error in that finding. The agency's charge, therefore, is sustained.

Disability Discrimination

¶7 An appellant who raises a claim of disability discrimination may establish that he is disabled by showing that he has a physical or mental impairment that substantially limits a major life activity, that he has a record of such an impairment, or that he is regarded as having such an impairment. *See* 29 C.F.R. § 1614.203(a)(1). The term "major life activity" means "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1614.203(a)(3).[1] The term "substantially limits" describes a person who is unable to perform a major life activity that the average person in the general population can perform, or is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity as compared with the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. § 1630.2(j)(1); *see Medina v. Reno*, EEOC No. 01954883 (Dec. 5, 1997); *Walsh v. U.S. Postal Service*, 74 M.S.P.R. 627, 633 (1997) (the Rehabilitation Act was amended to incorporate the standards applied under Title I of the Americans with Disabilities Act).

¶8 To meet his burden of proof with respect to establishing a prima facie case of disability discrimination where the appellant cannot perform his job without some form of reasonable accommodation, the appellant must show that he is a disabled person, that the action appealed was based on his disability, and, to the extent possible, he must articulate a reasonable accommodation under which he believes

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[1] This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. Appendix to 29 C.F.R. Part 1630, discussing 29 C.F.R. § 1630.2(i).

he could perform the essential functions of his position or of a vacant position to which he could be reassigned. *Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 560 (1997). Where the agency explicitly bases its action on an appellant's disability, thus, presenting direct evidence of discrimination, the issue becomes whether the appellant is a qualified disabled person against whom the agency may not discriminate, and whether the agency shows that the reasonable accommodation at issue would create an undue hardship. *Brocks v. U.S. Postal Service*, 78 M.S.P.R. 101, 106 (1997). Ultimately, the appellant must prove that he is a "qualified" disabled person, e.g., a disabled individual who can perform the essential functions[2] of his position, with or without reasonable accommodation, without endangering the health and safety of himself or others. *Id*.

¶9 If the appellant establishes a prima facie case, the agency must produce evidence to rebut the appellant's claim. If the employer claims that the disabled individual is unqualified to perform the job, even with the proposed accommodation, the disabled individual must prove that he would, in fact, be qualified to perform the essential functions of the job if the employer were to adopt the proposed accommodation, and that the proposed accommodation is objectively reasonable. *Id*. at 107. The burden of proof remains with the appellant in such a case. *Id*. If the appellant does prove that he can perform his job, or a position to which he can be reassigned, with reasonable accommodation, and/or the agency concedes this point, the burden of production shifts to the agency to show that the reasonable accommodation at issue would create an undue hardship. *Id*. In determining whether a proposed accommodation would create an

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[2] The term "essential functions" generally means the fundamental job duties of the employment position the individual with a disability holds or desires. 29 C.F.R. § 1630.2(n)(1). The regulations set forth reasons why a job function may be considered essential, as well as evidence of whether a particular function is essential. *See* 29 C.F.R. § 1630.2(n)(2)-(3).

undue hardship for the agency, the Board will consider: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of the agency operation, including the nature and composition of the agency's work force; and (3) the nature and cost of the accommodation. *Id*.

¶10 Here, the administrative judge found that the appellant asserted that the agency should not have required him to attend training in Norman, Oklahoma, but instead should have accommodated him by permitting him to receive training in Billings, Montana. She found that the Norman, Oklahoma facility is a major training facility, processing 49,000 agency students each year. The administrative judge further found that it was a hands-on educational facility for the agency's automated equipment, and that it would be prohibitively costly to shut down the extremely complex, on-site machinery in Billings, Montana in order to train one employee who could not travel to Norman, Oklahoma. The administrative judge thus found that "the appellant's inability to travel to requisite training, which is a major part of his job, disqualifies him from retaining that position, and leads to the conclusion that he is not a qualified individual entitled to accommodation." She also found that "the agency did accommodate the appellant's medical condition by assigning him to a position within his qualifications that does not require him to travel."

¶11 On review, the appellant claims that the administrative judge did not address his claims that the agency could have accommodated him by affording him a deferral of the required training while his medical condition stabilized, as it did for another employee, or by assigning him to a position at a grade between PS-9 and PS-3, for which the testimony indicated he is qualified. PFR at 9-11. The agency, in response, asserts that the appellant is not qualified for any position above the PS-3 level because those positions "require some degree of specified technical training, which the appellant cannot attend." PFR File, Tab 3 at 2.

¶12 While it is clear that the agency's action was based on the appellant's alleged disability, the administrative judge made no findings with respect to whether the appellant was in fact disabled, including whether his physical impairment "substantially limited" a major life activity. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). In addition, the administrative judge erroneously did not address the appellant's argument that the agency should have reasonably accommodated him by deferring his training requirement and/or offering him a position at a higher grade level than PS-3. *See* Hearing Tape 6, Side A (appellant's closing argument); *Clifford v. Department of Agriculture*, 50 M.S.P.R. 232, 236 (1991) (remanding the appeal where the initial decision did not include findings and conclusions with respect to all of the appellant's proposed accommodations for his disabling condition). When a nonprobationary employee becomes unable to perform the essential functions of his position even with reasonable accommodation due to a disability, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary, unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. 29 C.F.R. § 1614.203(g). In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required. *Id.*

¶13 Although the administrative judge found that training was a "major part" of the appellant's duties, she made no finding regarding whether it was an "essential

function" of his position, nor did she summarize the evidence and legal reasoning in support of such a finding. *Spithaler*, 1 M.S.P.R. at 589. Further, the administrative judge erroneously found that the appellant's involuntary, disciplinary demotion constituted a reasonable accommodation. *See Edinboro v. Department of Health & Human Services*, 33 M.S.P.R. 91, 93 (1987) (an involuntary demotion cannot constitute a reasonable accommodation). Such an involuntary demotion is to be contrasted with an offer (and voluntary acceptance) of a reassignment to a vacant position at the highest available grade or level below the employee's current grade or level. *See* 29 C.F.R. § 1614.203(g).

¶14 Finally, the basis for the administrative judge's determination that the appellant is not a qualified disabled person is unclear. It is not clear, for example, whether she found that the appellant did not meet his burden of proving that his requested accommodation of training in Billings, Montana was objectively reasonable, or whether she found that the appellant was a qualified disabled person, but the agency met its burden of proving that the reasonable accommodation at issue would create an undue hardship.

¶15 Accordingly, the above issues shall be addressed on remand.

Nexus

¶16 The appellant asserts on review that he cannot be reduced in grade except upon a showing that the reduction is for such cause as will promote the efficiency of the service, and that such a showing was not made in this case. PFR at 11. Specifically, he alleges that testimony was presented that "training is staggered [among all the ETs] so that, at any given point in time, there are ETs qualified in each of the various areas of expertise necessary for an efficient operation of the department." PFR at 10. The appellant asserts that "[n]othing was offered which shows that a deferral of Mr. Fox's training would in any way affect the efficiency of the service. Rather, it is clear that enough of the ET's had received training so as to enable a 'qualified' individual to be on premises at all times." *Id.*

¶17 The initial decision does not address the issue of nexus. Thus, the administrative judge shall address this issue on remand, including the arguments made by the appellant on this issue below and on review. *See Goldstein v. Department of the Treasury*, 62 M.S.P.R. 622, 628 (1994), *vacated and remanded on other grounds*, 62 F.3d 1430 (Fed. Cir. 1995) (Table).

The Penalty

¶18 The appellant asserts that, while the initial decision addresses the issue of the harshness of the penalty in a disparate treatment context, it does not address the issue of whether the nature and extent of the demotion was appropriate. For example, the appellant asserts that testimony was offered at the hearing that there are positions between the PS- 9 ET position and the PS- 3 Custodian position, and that the appellant was qualified for those positions.

¶19 As set forth above, an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler*, 1 M.S.P.R. at 589; *see* 5 C.F.R. § 1201.111(b)(1) (each initial decision shall contain "[f]indings of fact and conclusions of law upon all the material issues of fact and law presented on the record," as well as "[t]he reasons or bases for those findings and conclusions."). Here, after addressing the appellant's disparate penalty claim, the initial decision merely finds that "the agency considered the relevant factors and imposed a penalty that is within the realm of reasonableness. *See* testimonies of Bob Klein, and John Wathen; *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981)." There is no summary of the evidence relating to the reasonableness of the penalty, nor any discussion of the relevant *Douglas* factors and why the agency should be deemed to have exercised its discretion within the tolerable limits of reasonableness by demoting the appellant to a PS-3 position.

¶20 An initial decision becomes in many cases the final decision of the Board. Consequently, such a decision is required to constitute an "adjudication," 5 U.S.C. § 1204(a)(1), which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals. This is essential to enable the parties and any reviewing court to determine the factual basis for the Board's decision and to ascertain whether the Board considered all relevant factors or made any error of judgment. *Spithaler*, 1 M.S.P.R. at 588.

¶21 Here, we cannot determine from the initial decision whether the administrative judge considered all relevant factors or made an error of judgment with regard to the agency's choice of penalty. The initial decision, therefore, does not meet the *Spithaler* standard, and must be remanded. *See Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 148 (1993) (where the appellant argued that the agency should have mitigated its penalty by reassigning him to an administrative position, and the administrative judge did not address this contention, the Board found error under *Spithaler*); *Wellman v. Department of the Navy*, 49 M.S.P.R. 149, 152-53 (1991) (the administrative judge's failure to consider the appellant's medical condition in determining the appropriateness of the penalty was error under *Spithaler*); *Angelo v. U.S. Postal Service*, 52 M.S.P.R. 664, 668 (1992) (remanding the appeal where the administrative judge failed to address all relevant mitigating factors).

¶22 The appellant also claims that the administrative judge erred in finding no disparate treatment. The administrative judge found that "[t]he appellant also asserts that the penalty is too harsh, citing the example of another ET employee, Al Doney, who was granted a temporary dispensation from travel to training due to a medical condition. In the case of Mr. Downey [sic], the disability was temporary, whereas with the appellant, who still does not even report to work at all, there is no end in sight to his inability to travel. Thus, I find no disparity in the two situations." As the appellant asserts on review, *see* PFR at 9, there is

some evidence in the record suggesting that he has not been able to return to work due to conditions (situational adjustment disorder, significant anxiety disorder, and depression) that arose from his demotion, not from his initial hypertension. *See, e.g.*, AF, Tab 22, Exs. B and C; AF, Tab 16, Subtab 4. There is some record evidence also suggesting that the appellant's hypertension was temporary, like the medical problems of Doney. *See* AF, Tab 9, Subtab 4EE (October 8, 1997 letter from Dr. Carr indicating that he had advised the appellant to "decline this training session at this time," and that he would continue to follow the appellant on at least a quarterly basis "to re-evaluate in the future.").

¶23 Thus, the administrative judge's basis for finding the situations of Doney and the appellant dissimilar appears to be unsupported. The claim of disparate penalty shall be reexamined on remand.

ORDER

¶24 We REMAND this appeal for further adjudication and the issuance of a new initial decision consistent with this Opinion and Order.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.